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IN THE

United States Supreme Court

AZZAM AHMED,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition For a Writ of Certiorari to the Ohio Court of Appeals for the Eighth Judicial District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the elimination by judicial decision of presumptions in favor of minimum sentences and against maximum or consecutive sentences as applied to a defendant convicted of crimes which allegedly occurred prior to the judicial decision, resulting in imposition of maximum, and consecutive sentences, violates the proscription against *ex post facto* laws and the Fourteenth Amendment.

Whether elimination of the consideration of defendant's criminal history is required by this Court's decisions in *Apprendi v. New Jersey* and *Blakely v. Washington*.

Whether the failure of appellate counsel to raise clear constitutional errors on appeal, which would have resulted in the reversal and vacation of defendant's maximum, consecutive sentences, violates the defendant's Sixth Amendment right to the effective assistance of counsel.

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Petitioner Azzam Ahmed respectfully prays that a Writ of Certiorari issue to review the decision of the Ohio Court of Appeals for the Eighth Judicial District entered on June 11, 2007.

OPINIONS BELOW

The Ohio Court of Appeals for the Eighth Judicial District announced its decision in this case on December 7, 2007. A copy of that opinion is attached as Appendix B. The Ohio Supreme Court issued a one-page order denying discretionary review of the Court of Appeals' decision on March 12, 2008. A copy of that order is attached as Appendix A.

JURISDICTION

The Ohio Supreme Court denied discretionary review on March 12, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Federal Constitutional Provisions

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . and to have the assistance of counsel for his defense."

Article I, Section 10 of the United States Constitution provides in relevant part: "No bill of attainder or ex post facto Law shall be passed."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

B. State Statutory Provisions

Ohio Revised Code Section 2929.14(A) provides in relevant part:

> "(A) . . . if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter, the court shall impose a definite prison term that shall be one of the following:
>
> "(1) For a felony of the first degree, the prison term shall be three, four, five, six, seven, eight, nine, or ten years.
>
> "(3) For a felony of the third degree, the prison term shall be one, two, three, four, or five years."

Ohio Revised Code Section 2929.14(B) provides in relevant part:

> "(B) Except as provided in division (C), (D)(1), (D)(2), (D)(3), (D)(5), (D)(6), (G), or (L) of this section, in section 2907.02 or 2907.05 of the Revised Code, or in Chapter 2925. of the Revised Code, if

> the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender, the court shall impose the shortest prison term authorized for the offense pursuant to division (A) of this section, unless one or more of the following applies:
>
> "(1) The offender was serving a prison term at the time of the offense, or the offender previously had served a prison term.
>
> "(2) The court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others.

Ohio Revised Code Section 2929.14(C) provides in relevant part:

> "(C) Except as provided in division (G) or (L) of this section or in Chapter 2925. of the Revised Code, the court imposing a sentence upon an offender for a felony may impose the longest prison term authorized for the offense pursuant to division (A) of this section only upon offenders who committed the worst forms of the offense, upon offenders who pose the greatest likelihood of committing future crimes, upon certain major drug offenders under division (D)(3) of this section, and upon certain repeat violent offenders in accordance with division (D)(2) of this section."

Ohio Revised Code Section 2929.14(C)(4) provides in relevant part:

> "(4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> "(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> "(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> "(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender."

Ohio Rule of Appellate Procedure 26(B) provides in relevant part:

> "(B) Application for reopening.
>
> "(1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time."

C. Other pertinent statutes

Relevant Ohio sentencing statutes, which are attached as Appendix C, include the following:

Ohio R.C. § 2907.02 – Rape

Ohio R.C. § 2907.03 – Sexual Battery

Ohio R.C. § 2907.06 – Sexual Imposition

Ohio R.C. § 2953.08 – Grounds for Appeal of Sentence

STATEMENT OF THE CASE

On August 29, 2002, the defendant, Dr. Azzam Ahmed, a 55-year gynecologist, was arrested and charged with sexual misconduct with a patient. The arrest was accorded great local publicity, and the Parma, Ohio, Police Department provided a

telephone number to call for other patients who believed they might have been similarly treated. The result was a secret indictment against Dr. Ahmed, issued on May 20, 2003, alleging fifty-three offenses involving thirty-seven patients: twenty-seven counts of sexual imposition, a third-degree misdemeanor, twenty-four counts of sexual battery, a third-degree felony, and two counts of rape, a first-degree felony.

The case proceeded to trial in January of 2004. The prosecution dismissed three counts of sexual imposition during trial. The jury ultimately acquitted Dr. Ahmed of thirty of the remaining fifty counts, rendering not guilty verdicts on thirteen of the twenty-four counts of sexual imposition, and seventeen of the twenty-four counts of sexual battery. It convicted him of eleven sexual imposition counts, seven sexual battery counts, and the two rape counts, which involved a single patient, based on a theory that her capacity was diminished. The complainant in the rape counts had testified for the prosecution in its case-in-chief, but then returned to the stand as a witness for the defense, and recanted her testimony.

At the time of the trial, and at the time Dr. Ahmed allegedly committed the crimes, Ohio's sentencing scheme did not give a judge unfettered discretion to impose a sentence within the statutory range. If the defendant had never served a prison sentence before, the trial judge had to make certain factual findings before imposing more than a minimum sentence. The trial judge was also required to make

certain factual findings before imposing maximum sentences, and certain factual findings before imposing consecutive sentences. In short, a first offender such as Dr. Ahmed was presumptively entitled to a minimum, concurrent sentence. The trial court imposed maximum sentences on each of the offenses (two of the sexual battery convictions merged with the two rape convictions), and ordered the sentences to be served consecutively, for a total sentence of forty-five years.

Upon appeal, the court of appeals affirmed the convictions, but vacated the sentences, holding that the findings made by the trial judge were not sufficient to overcome the presumption against maximum or consecutive sentences, and remanded the matter for resentencing. It should be noted that this was not a case of the appellate court determining that the trial judge had failed to make any findings; rather, the appellate court determined that the findings the trial judge *did* make were legally insufficient to support maximum or consecutive sentences.

Prior to Dr. Ahmed's resentencing, the Ohio Supreme Court issued its decision in *State v. Foster*, 109 Ohio St.3d 1 (2006). The court held that the judicial findings required by the statutes in order to impose more than minimum, maximum, or consecutive sentences constituted judicial fact-finding in derogation of a defendant's Sixth Amendment right to a jury trial, as explained in this Court's ruling in *Blakely v. Washington*, 542 U.S. 296

(2004). As a remedy, the court severed the portions of the statute requiring those judicial findings.

The result was that a judge no longer had to make *any* findings in order to impose more than minimum, maximum, or consecutive sentences. At Dr. Ahmed's resentencing, that is precisely what occurred: the trial judge again imposed maximum, consecutive sentences.

Appeal was once more taken to the court of appeals, which affirmed the sentences in an unpublished opinion announced on May 31, 2007, and journalized on June 11, 2007. Dr. Ahmed then retained new appellate counsel, who filed an appeal to the Ohio Supreme Court, alleging, *inter alia*, that the application of *Foster* to crime allegedly committed prior to the decision constituted a violation of defendant's due process rights against *ex post facto* judicial rulings, and that the failure of prior appellate counsel to raise that issue in the court below constituted ineffective assistance. The Ohio Supreme Court denied discretionary review.

Dr. Ahmed then timely filed an application to reopen the appeal, under Ohio App.R. 26(B), which permits such an application based on a claim of ineffective assistance of counsel. On December 7, 2007, the Cuyahoga County Court of Appeals denied the application. Dr. Ahmed then sought review in the Ohio Supreme Court, and on March 12, 2008, Supreme Court denied review.

This Petition for Writ of Certiorari follows.

REASONS FOR GRANTING WRIT

I. CERTIORARI IS APPROPRIATE TO DECIDE WHETHER THE RETROACTIVE APPLICATION BY JUDICIAL DECISION OF THE ELIMINATION OF PRESUMPTIONS IN FAVOR OF MINIMUM SENTENCES, AND AGAINST MAXIMUM OR CONSECUTIVE SENTENCES, TO A DEFENDANT CONVICTED OF OFFENSES ALLEGEDLY COMMITTED PRIOR TO THE DECISION, VIOLATES A DEFENDANT'S DUE PROCESS RIGHTS AGAINST *EX POST FACTO* JUDICIAL DECISION-MAKING.

It is difficult to understate the effect of this Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004) upon state sentencing laws. Many, such as Ohio's, provided for "presumptive" sentences, under which a defendant faced either an exact sentence or a sentence within a specific range, and the sentencing court was required to impose that sentence unless it found certain facts sufficient to override the presumption for the specified sentence. This Court's subsequent decisions, such as *Cunningham v. California*, 127 S.Ct. 856 (2007) make clear what the Ohio Supreme Court acknowledged about Ohio's sentencing scheme in *State v. Foster*, 109 O.St.3d 1 (2006): that a system of presumptive sentencing which depended upon judicial fact-finding to override those presumptions could not survive *Blakely*.

Certiorari should be granted by this court to resolve the question precisely raised by this case:

whether the *ex post facto* application of *Foster*'s remedy—essentially, abolishing those presumptions and allowing a trial court unfettered discretion in imposing more than minimum, maximum, and consecutive sentences—violates the rights of a defendant convicted of crimes which allegedly occurred prior to *Foster*. While the immediate focus of the Court's review would be on Ohio's sentencing laws, as noted, a decision would provide clarity to other states which employed the same type of presumptive sentencing scheme.

At the outset, it is important to understand the Ohio system in effect at the time Dr. Ahmed allegedly committed his crimes in 2001 and 2002. At that time, as now, the statutory penalty for first-degree felonies such as rape was a sentence of from three to ten years, in yearly increments. The statutory penalty for third-degree felonies such as sexual battery was a sentence of one to five years, again in yearly increments.

A trial judge, however, was not free to impose a penalty anywhere within that range. If the defendant had never served a prison term before (Dr. Ahmed had never previously been charged, let alone convicted, of a crime), the judge had to make certain findings in order to impose more than the minimum sentence: that a minimum sentence "would demean the seriousness of the crime" or "would not adequately protect the public." Similarly, the judge also had to make certain findings in order to impose a maximum sentence: that the defendant had "committed the worst form[ ] of the

offense" and that the defendant "pose[d] the greatest likelihood of committing future crimes." Moreover, before imposing consecutive sentences, the trial judge had to make additional findings, such as that "consecutive sentences are not disproportionate to the seriousness of the offender's conduct" and that "[a]t least two of the multiple offenses were committed as part of one or more courses of conduct." Finally, Ohio R.C. § 2953.08 provided meaningful review of sentencing decisions, allowing the appellate court to determine whether the trial judge's findings were sufficient to support more-than-minimum, maximum, or consecutive sentences.

In *Blakely*, this Court established that

> "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." 532 U.S. at 303-304. (Emphasis in original).

Under *Blakely*, then, at the time he allegedly committed his crimes, the maximum penalty Dr. Ahmed faced—the maximum penalty which could be imposed upon him without the trial court making any additional findings—was a minimum, concurrent sentence of three years. Any sentence

beyond the minimum, let alone maximum or consecutive sentences, required judicial fact-finding that was barred by *Blakely*.

The Ohio Supreme Court recognized this in *Foster*, and as a remedy simply excised the portions of the sentencing statutes which required fact-finding, resulting in the elimination of the presumptions in favor of minimum sentences and against maximum and consecutive sentences. Thus, at the time Dr. Ahmed was resentenced in 2006, he no longer could claim the benefit of the presumptions which had been in effect at the time he allegedly committed the crimes for which he was convicted.

Dr. Ahmed contends that the retroactive application of *Foster* to him, in the elimination of sentencing presumptions to which he was otherwise entitled, constitutes a violation of his rights to due process.

The prohibition against the retroactive application of the criminal laws is contained in Article I, Section 10 of the United States Constitution: "No . . . ex post facto Law shall be passed." In *Calder v. Bull*, 3 U.S. (Dall.) 386, 390 (1798), this Court defined the four types of laws which would run afoul of that prohibition. The one pertinent to this case is the third:

> "Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed."

As a result of the Ohio Supreme Court's decision in *Foster*, and its elimination of the presumptive sentences to which Dr. Ahmed was entitled, he was subjected to substantially greater punishment than at the time he allegedly committed his crimes.

There are two prior decisions of this Court which bear upon Dr. Ahmed's situation. The first is *Hicks v. Oklahoma*, 447 U.S. 343 (1980), which involved that state's habitual offender statute. Hicks was charged with heroin distribution, which carried a maximum of 40-year prison sentence. Sentences were imposed by juries in Oklahoma, and under the habitual offender statute, the jury was required to impose the maximum prison term if it determined that the defendant had previously been convicted of two felonies. Hicks had been previously convicted of two felonies, and was thus given the 40-year sentence by the jury. While the case was on appeal, the state supreme court held that the habitual offender statute was unconstitutional. Nonetheless, the Oklahoma courts affirmed the conviction and sentence, deciding that Hicks wasn't prejudiced because the sentence was within the range of punishment that "could have been imposed in any event." *Hicks*, 447 U.S. at 344. (Emphasis added).

This Court reversed, noting that

> "It is argued that all that is involved in this case is the denial of a procedural right of exclusively state concern. Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury,

> it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. In this case Oklahoma denied the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury *might* have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision. Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law." 447 U.S. at 346-347 (footnotes and internal citations omitted).

In *Hicks*, but for the unconstitutional statute, the defendant would have been entitled to the exercise of jury's discretion in determining his sentence. The state's argument that he had no "absolute right" to that sentence was correct, but beside the point: as this Court noted, he had a "right to have a jury fix his punishment in the first instance, and this is the right that was denied. Moreover, it is a right that substantially affects the punishment imposed." *Ibid.* The change in the law could not validly deprive him of his liberty interest.

Dr. Ahmed's case presents the converse of that situation. He was entitled to a minimum sentence unless the trial judge made certain findings. Even if those findings were made, he was entitled to a non-maximum, concurrent sentence unless the trial judge made additional findings. The appellate court, in its initial review of the case, found that the findings made by the trial judge did not justify non-minimum, maximum, and consecutive sentences. The Ohio Supreme Court then determined that the required are unconstitutional, and eliminated them, not only subjecting Dr. Ahmed to maximum consecutive sentences without the findings that would have been required to support it, but also essentially eliminating any meaningful appellate review of the sentence.[1] Thus, like the defendant in *Hicks*, Dr. Ahmed was deprived of his liberty interest in being sentenced according to the laws in effect at the time he committed the alleged crimes.

This Court's decision in *Miller v. Florida*, 482 U.S. 423 (1987) provides an even closer analogue. That case dealt with Florida's sentencing scheme, which specified a range of presumptive sentences for each offense. At the time the defendant committed his crime of sexual battery, the statutes pro-

[1] Although the state supreme court has not ruled on this issue, most Ohio appellate courts have concluded that the appropriate standard for review of a sentence is the highly deferential "abuse of discretion," which even some judges have acknowledged provides unfettered power to impose any sentence within the statutory range. See *State v. Moore*, 2008 Ohio 4699 (8th Dist. 2008) (J. Gallagher, concurring).

vided a presumptive sentence of 3½ to 4½ years. By the time he was convicted and sentenced, however, the presumptive sentence had been increased to 5½ to 7½ years. The Florida Supreme Court upheld the trial court's imposition of the new sentence, deciding that there was no *ex post facto* violation because "the presumptive sentence established by the guidelines does not change the statutory limits of the sentence imposed for a particular offense." *State v. Jackson*, 478 So.2d 1054, 1056 (Fla. 1985).

On appeal, this Court first determined that

> "to fall within the *ex post facto* prohibition, two critical elements must be present: first, the law 'must be retrospective, that is, it must apply to events occurring before its enactment'; and second, 'it must disadvantage the offender affected by it.'" 482 U.S. at 430.

The Court unanimously concluded that defendant met both those criteria. The change in the law had obviously been applied retroactively, and there was no difficulty in concluding that the change in the sentencing scheme "disadvantaged" the defendant: it increased his presumptive sentence by two to three years.

The same argument applies here: Dr. Ahmed was entitled to a presumptive sentence of minimum, concurrent terms, and the *Foster* decision's elimination of that entitlement operated retrospectively to his disadvantage.

The Florida change resulted from legislative action, while *Foster* was of course a judicial decision. The Ohio Supreme Court's ruling in *Foster* does not directly implicate the *Ex Post Facto* Clause, since that provision is only a limitation upon the powers of the legislature, not the judicial branch. *Marks v. United States*, 430 U.S. 188, 191 (1977).

This Court has held, however, that the retroactive application of a judicial decision may be similarly prohibited because of due process considerations. In striking down the retroactive application of an interpretation of a criminal statute by the state's highest court, this Court ruled in *Bouie v. Columbia*, 378 U.S. 347 (1964),

> "The Due Process Clause compels the same result . . . where the State has sought to achieve precisely the same effect by judicial construction of the statute. While such a construction is of course valid for the future, it may not be applied retroactively, any more than a legislative enactment may be, to impose criminal penalties for conduct committed at a time when it was not fairly stated to be criminal." 378 U.S. at 362.

The protections afforded by due process considerations against the retroactive application of judicial decisions are not necessarily co-extensive with the protections of the *Ex Post Facto* Clause against the retroactive application of criminal statutes. The distinction in those protections was defined by

this Court in *Rogers v. Tennessee*, 532 U.S. at 451, 462 (2001), in which this Court stated,

> "a judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where it is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" (Quoting *Bouie*, 378 U.S. at 354).

Thus, the proper focus is on the warning and notice a defendant has in the possibility of a judicial decision retroactively enhancing the criminality of his conduct or the penalty to be imposed for it. *United States v. Lanier*, 520 U.S. 259, 266 (1997) ("Due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.")

Had Dr. Ahmed's alleged crimes been committed after *Blakely* was decided, an argument might be advanced that *Blakely* gave just such notice. The 6th Circuit concluded as much with regard to an argument on the retroactive application of *Booker v. United States*, 543 U.S. 220 (2005):

> "While it is true that precisely what effect Blakely would have on the Guidelines was not known, *Blakely* was decided before defendant committed the robberies here. Thus, it would not have been a leap of logic to expect the Supreme Court to apply *Blakely* to the Guide-

lines in some manner." *United States v. Barton*, 455 F.3d 649, 653-654 (6th Cir. 2006).

There can be no such argument here, however; Dr. Ahmed's alleged crimes occurred several years before *Blakely* was decided, and while this Court's earlier decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 684 (2002) served as the groundwork for *Blakely*, it would be difficult to argue that more than a few legal scholars anticipated the *Blakely* decision, let alone that the average individual had "fair warning" of it.

Moreover, the change wrought by *Foster* specifically impacted Dr. Ahmed. As noted, his original sentence was vacated not because the judge failed to make any findings justifying a maximum, consecutive sentences, but because the findings the trial judge *did* make did not warrant maximum, consecutive sentences. Given the trial court's failure to make those findings, had it not been for the *Foster* decision, the trial judge would have been bound to give Dr. Ahmed no worse than non-maximum, concurrent sentences. Because of *Foster*, the trial court gained unfettered discretion to sentence Dr. Ahmed to maximum, consecutive sentences of 45 years.[2]

In summary, due process mandates that a judicial decision nullifying the presumptive sentences

[2] Ohio law does not provide for parole or any other method of early release for someone sentenced to more than ten years in prison. Dr. Ahmed's scheduled release date from prison is February of 2049, when he will be 102 years old.

contained in Ohio's statutes cannot be retroactively applied to Dr. Ahmed so as to deny him the benefit of those statutes. The Ohio Supreme Court's retroactive elimination of the presumptive sentencing in *Foster* disadvantaged Dr. Ahmed in the same fashion that the South Carolina Supreme Court's retroactive expansion of the criminal trespass statute disadvantaged the defendants in that case.

II. CERTIORARI IS APPROPRIATE TO DECIDE WHETHER THE ELIMINATION OF A FIRST-OFFENDING DEFENDANT'S PRESUMPTIVE RIGHT TO A MINIMUM SENTENCE IS REQUIRED BY THIS COURT'S DECISIONS IN *APPRENDI V. NEW JERSEY* AND *BLAKELY V. WASHINGTON*.

At the time Dr. Ahmed allegedly committed the crimes for which he was convicted, Ohio R.C. § 2929.14(B) provided that if a court imposed a prison sentence for a felony, it had to impose the minimum sentence unless either "(1) The offender was serving a prison term at the time of the offense, or the offender previously had served a prison term," or "(2) The court finds on the record that the shortest prison term will demean the seriousness of the offender's conduct or will not adequately protect the public from future crime by the offender or others."

In *Foster*, *supra*, the Ohio Supreme Court correctly concluded that the second subsection—whether the minimum sentence would "demean the seriousness of the offense" or "not adequately protect the public"—required judicial fact-finding not

permitted under *Blakely v. Washington, supra.* Having determined that the sub-section of the statute was constitutionally defective, the next question presented was the determination of an appropriate remedy. The court chose to sever the entire section.

Defendant respectfully submits that this remedy was neither necessary nor appropriate. In *Apprendi, supra,* this Court had held that the Sixth Amendment posed no impediment to consideration of a defendant's prior criminal record:

> "*Other than the fact of a prior conviction,* any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490 (emphasis supplied).

This holding was affirmed in *Blakely.*

There was nothing unconstitutional about Ohio R.C. § 2929.14(B) or § 2929.14(B)(1): *Apprendi* and *Blakely* clearly permit a sentencing court to take into account a defendant's criminal history, which is exactly what Ohio R.C. § 2929.14(B)(1) permitted. The only infirmity was in § 2929.14(B)(2). As long as (B)(1), concerning whether a defendant had previously been imprisoned, was intact, the section could withstand constitutional scrutiny. The excising of the entire section, rather than just (B)(2), the offending subsection, was not constitutionally required.

Moreover, complete severance, along with severance of the presumptions against maximum and consecutive sentences, ran contrary to the intent of the legislature. The enabling statute for the 1996 reforms clearly intended for the statutes enacted to provide uniformity and proportionality "with increased penalties for offenses based upon the seriousness of the offense and the criminal history of the offender," and with judicial discretion to be limited by those goals. Those goals were embodied in the statutes ultimately enacted and subsequently reviewed by the Ohio Supreme Court. That court, in fact, expressly stated that the intent of Senate Bill 2 was to reserve enhanced sentences for the worst offenses and offenders. *State v. Comer*, 99 Ohio St.3d 463, at 468 (2003), citing *State v. Boland*, 147 Ohio App. 3d 151, 162 (7th Dist. 2002).

At least three judges of the Ohio Supreme Court recognized this in the recent decision of *State v. Hairston*, ___ Ohio St.3d ___, 2008 Ohio 2338 (2008). While concurring in the judgment, which affirmed maximum and consecutive sentences totaling 134 years for a 24-year-old defendant who had committed "noncapital offenses arising from three events that fortunately did not involve serious physical harm to his four victims," Justice Lanzinger, joined by Chief Justice Moyer and Justice Pfeifer, noted that the *Foster* court had foreseen the exact problem addressed here: "'By vesting sentencing judges with full discretion, it may be argued, [severance] vitiates S.B. 2's goals, particularly with respect to reducing sentencing disparities and promoting uni-

formity . . . [*Foster*], 109 Ohio St.3d [at 30]." *State v. Hairston*, *supra* (Lanzinger, J., concurring).

The problems with the severance remedy are amply demonstrated by Dr. Ahmed's case. The appellate court in the first appeal had clearly rejected the trial court's justification for imposing maximum, consecutive sentences, noting,

> "The trial court reasoned that the harm of the offenses was so great and unusual because of the number of victims who had to 'bare their souls' in testifying against Ahmed. We fail to see how this reasoning relates to the harm of the specific offenses. Typically, most criminal cases involve victims testifying as to the circumstances of the offense. Although we recognize the sensitive nature of the victims' testimony in the instant case, we find the trial court's reliance on this factor misplaced for purposes of justifying consecutive sentences." *State v. Ahmed*, 2005 Ohio 2999, at ¶ 106, fn. 9 (8th Dist. 2005).

Yet at the resentencing after remand, since it came after the intervening decision in *Foster*, the trial court was not required to advance any justification whatsoever for imposing a sentence under which Dr. Ahmed, a first offender, will remain imprisoned until February 2049, when he will be 102 years old. Allowing a trial court wholly unfettered discretion in imposing a sentence is completely at odds with the purpose of the sentencing reforms enacted in 1996. The Ohio Supreme Court's sentencing remedy in *Foster* was not con-

stitutionally required, and was clearly contrary to the intent of the legislature in crafting the 1996 sentencing reforms. *Foster's* severance remedy, at least as it pertains to the presumption for minimum sentences for first offenders, exceeded the requirements for sentencing imposed by this Court in *Apprendi* and *Blakely*, and should be reversed.

III. CERTIORARI IS APPROPRIATE TO DECIDE WHETHER APPELLATE COUNSEL IS INEFFECTIVE FOR FAILING TO RAISE SENTENCING ERRORS ON APPEAL WHEN THE FAILURE TO PROPERLY PRESERVE THE ISSUE RESULTS IN THE AFFIRMANCE OF THE MAXIMUM POSSIBLE SENTENCE.

As noted, prior appellate counsel did not raise the due process violation inherent in the retroactive application of *Foster* to Dr. Ahmed's case. That issue was raised for the first time by present appellate counsel, in the Memorandum in Support of Jurisdiction seeking discretionary review by the Ohio Supreme Court, which was denied. Ordinarily, the failure to raise an issue on appeal in the lower court constitutes a waiver of that issue on further appeal.

The failure to raise the issue below does not constitute a waiver, however, where prior appellate counsel was ineffective in failing to raise it.[3] The

[3] Present appellate counsel also asserted the issue of the ineffective assistance of prior appellate counsel, in their failure to raise the due process issue, in the aforementioned Memorandum in Support of Jurisdiction seeking discretionary review by the Ohio Supreme Court.

test for ineffective assistance of counsel enunciated by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984) also pertains to appellate counsel. *Roe v. Flores-Ortega*, 528 U.S. 470 (2000).

This does not impose upon appellate counsel a duty to raise *all* non-frivolous assignments of error. *Jones v. Barnes*, 463 U.S. 745 (1983). A defendant may be able to establish constitutionally inadequate performance, however, by demonstrating that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker. *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994). Essentially, the procedure for resolving that question is that outlined in *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1985):

> "When a claim of ineffective assistance of counsel is based on failure to raise viable issues, the district court must examine the trial court record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issued are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome."

Prior appellate counsel, in his Brief to the Ohio Court of Appeals, made two sentence-related arguments. (A third assignment of error related to the application of bond money to fines and costs.) The sum of counsel's argument was that while the *Fos-*

ter remedy "gave Trial Courts [sic] the ability to sentence at any level, maximum sentence, consecutive sentence or both, without stating reasons," Dr. Ahmed's resulting 45-year sentence, "violates the Eighth Amendment" and constituted "an 'exceptional sentence' based upon facts neither admitted nor found by a jury." Brief at 11.

These arguments represent a complete misreading of *Blakely* and its progeny. An "exceptional sentence" under *Blakely* is one in which the trial court employs judicial fact-finding to impose additional prison time, over and above what the jury verdict would allow. *Foster* permitted trial courts to impose maximum penalties without any fact-finding. Whether this is good policy might be subject to debate, but there is nothing in this Court's cases which suggest that this is constitutionally impermissible, let alone that it is an "exceptional sentence" under *Blakely*.

Moreover, the arguments are wholly at odds with prevailing Eighth Amendment jurisprudence, which limits consideration of that issue to single sentences, as opposed to the effect of sentences for multiple offenses. *United States v. Aiello*, 864 F.2d 257, 265 (2d Cir. 1988) ("Eighth amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence"); *Pearson v. Ramos*, 237 F.3d 881, 886 (7th Cir. 2001) ("every sentence * * * must be treated separately, not cumulatively, for purposes of determining whether it is cruel and unusual.")

To a large extent, this Court's resolution of the first argument raised in support of granting *certiorari* is outcome-determinative for the second argument: if this Court concludes that the retroactive application of the *Foster* remedy violates the due process rights of Dr. Ahmed, then it necessarily follows that prior appellate counsel was ineffective in not asserting that argument, and instead relying on "issues that were clearly and significantly weaker." *Gray v. Greer*, *supra*. It is respectfully submitted that just such a conclusion is warranted in this case.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that this Court should grant the Petition for Certiorari.

Respectfully submitted,

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APPENDIX

THE SUPREME COURT OF OHIO

Case No. 2008-0134

[STAMP]
FILED
MAR 12, 2008
CLERK OF COURT
SUPREME COURT OF OHIO

STATE OF OHIO

– v. –

AZZAM AHMED

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court dismisses the appeal as not involving any substantial constitutional question.

(Cuyahoga County Court of Appeals; No. 88315)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
NO. 88315

STATE OF OHIO,

Plaintiff-Appellee,

– v. –

AZZAM AHMED,

Defendant-Appellant.

JUDGMENT: APPLICATION DENIED

APPLICATION FOR REOPENING
MOTION NO. 399910
LOWER COURT NO. CR-437437
COMMON PLEAS COURT

RELEASE DATE: December 7, 2007

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JUDGE ANN DYKE:

{¶ 1} On August 14, 2007, the applicant, Azzam Ahmed, applied pursuant to App.R. 26(B) to reopen this court's judgment in *State v. Ahmed*, Cuyahoga App. No. 88315, 2007-Ohio-2639, in which this court overruled Ahmed's three assignments of error regarding his resentencing[1], but remanded to clarify an inconsistency between the sentencing hearing at which the judge imposed a forty-five year sentence and the journal entry which imposed a fifty-five year sentence.[2] On September 24, 2007, the State of Ohio filed a brief in opposition. For the following reasons, this court denies the application to reopen.

{¶ 2} First, res judicata properly bars this application. See, generally, *State v. Perry* (1967), 10 Ohio St.2d 175, 226 N.E.2d 104. Res judicata prevents repeated attacks on a final judgment and

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1 In *State v. Ahmed*, Cuyahoga App. No. 84220, 2005-Ohio-2999, this court affirmed his convictions for two counts of rape, seven counts of sexual battery and eleven counts of sexual imposition, but reversed and remanded for resentencing.

2 On remand on July 25, 2007, the trial judge clarified that Ahmed's sentence is to be forty-five years.

applies to all issues which were or might have been litigated. In *State v. Murnahan* (1992), 63 Ohio St.3d 60, 584 N.E.2d 1204, the Supreme Court of Ohio ruled that res judicata may bar a claim of ineffective assistance of appellate counsel unless circumstances render the application of the doctrine unjust.

{¶ 3} In the present case Ahmed appealed to the Supreme Court of Ohio, which denied his appeal. *State v. Ahmed*, Supreme Court of Ohio Case No. 07-1357. This court has consistently held that such appeals bar claims of ineffective assistance of appellate counsel based on the principles of res judicata. *State v. Kaszas* (Sept. 21, 1998), Cuyahoga App. Nos. 72546 and 72547, reopening disallowed (Aug. 14, 2000), Motion No. 16752; *State v. Bussey* (Dec. 2, 1999), Cuyahoga App. No. 75301, reopening disallowed (Aug. 8, 2000), Motion No. 16647 and *State v. Bluford* (Dec. 9, 1999), Cuyahoga App. No. 75228, reopening disallowed (May 31, 2000), Motion No. 15241. Moreover, before the Supreme Court of Ohio, Ahmed argued, inter alia, (1) ineffective assistance of appellate counsel, especially as to the failure to preserve arguments; (2) that the application of *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, violated the *Ex Post Facto* and Due Process Clauses; and (3) that because *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed2d 403 (2004), did not prohibit judicial fact finding on whether the defendant had previously served prison time, the trial court erred in imposing more than the minimum sentence. Ahmed's current application to reopen

raises these exact issues. The application of res judicata in this case would not be unjust.

{¶ 4} Moreover, under App.R. 26(B)(5) Ahmed has failed to show there is genuine issue as to whether he was deprived of the effective assistance of appellate counsel. In order to establish a claim of ineffective assistance of appellate counsel, the applicant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington* (1984), 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, cert. denied (1990), 497 U.S. 1011, 110 S.Ct. 3258.

{¶ 5} In *Strickland* the United States Supreme Court ruled that judicial scrutiny of an attorney's work must be highly deferential. The Court noted that it is all too tempting for a defendant to second-guess his lawyer after conviction and that it would be all too easy for a court, examining an unsuccessful defense in hindsight, to conclude that a particular act or omission was deficient. Therefore, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 104 S.Ct. at 2065.

{¶ 6} Specifically, in regard to claims of ineffective assistance of appellate counsel, the United States Supreme Court has upheld the appellate advocate's prerogative to decide strategy and tactics by select-

ing what he thinks are the most promising arguments out of all possible contentions. The court noted, "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Jones v. Barnes* (1983), 463 U.S. 745, 77 L.Ed.2d 987, 103 S.Ct. 3308, 3313. Indeed, including weaker arguments might lessen the impact of the stronger ones. Accordingly, the Court ruled that judges should not second-guess reasonable professional judgments and impose on appellate counsel the duty to raise every "colorable" issue. Such rules would disserve the goal of vigorous and effective advocacy. The Supreme Court of Ohio reaffirmed these principles in *State v. Allen*, 77 Ohio St.3d 172, 1996-Ohio-366, 672 N.E.2d 638 and *State v. Tenace*, 109 Ohio St.3d 451, 2006-Ohio-2987.

{¶ 7} Moreover, even if a petitioner establishes that an error by his lawyer was professionally unreasonable under all the circumstances of the case, the petitioner must further establish prejudice: but for the unreasonable error there is a reasonable probability that the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court need not determine whether counsel's performance was deficient before examining prejudice suffered by the defendant as a result of alleged deficiencies.

{¶ 8} Ahmed first argues that his appellate counsel should have raised the following assignment of

error: The Trial Court erred in sentencing Appellant to more than minimum sentences, as the imposition of a minimum sentence upon a defendant who has not previously been imprisoned did not constitute judicial fact-finding under *Blakely v. Washington*, 542 U.S. 296 (2004). The gravamen of this argument is that the Supreme Court of Ohio improperly declared all of R.C. 2929.14(B) unconstitutional, when it should have only invalidated subsection (B)(2) and preserved the General Assembly's presumption of a minimum sentence. Ahmed further recognizes that this court, if presented with this argument, should not have upheld it, because the argument seeks the partial overruling of *Foster*. Nevertheless, Ahmed maintains that his appellate counsel was ineffective for failing to preserve the argument for review by the Supreme Court of Ohio.

{¶ 9} It is hard to imagine a more basic strategic choice than deciding whether to advance an immediately losing argument so that it can be raised at the next level or to argue an issue on existing law in the hope of an immediate benefit to the client. This court will not second guess appellate counsel's strategic decisions.

{¶ 10} Ahmed next submits that his appellate counsel should have argued that *Foster* violated the *Ex Post Facto* Clause and deprived him of the presumptions of a minimum sentence and against maximum, consecutive sentences. However, this court fully considered the *Ex Post Facto* argument and rejected it in *State v. Mallette*, Cuyahoga App. No.

87984, 2007-Ohio-715. See, also, *State v. Moviel*, Cuyahoga App. No. 88984, 2007-Ohio-5947. Appellate counsel is not ineffective for rejecting a losing argument. Furthermore, appellate counsel did argue that the trial court erred in imposing maximum and consecutive sentences which violated the Ohio and United States Constitutions and that the sentencing criteria as interpreted in *Foster* violated the Sixth Amendment. Again, this court will not second guess the professional judgments of counsel.

{¶ 11} Finally, Ahmed asserts that his appellate counsel mishandled the third assignment of error, that the trial court erred in allowing Ahmed's bail money which had been provided by his wife to be applied to fines, by failing to submit a full and adequate record. In the subject appeal Ahmed argued that when his trial lawyer posted the $50,000 bond, he signed a "Clerk's Office Form" which authorized the application of this money toward any fine imposed. At the initial sentencing the trial judge imposed a $115,000 fine, and the clerk's office applied the bond money to the fine the next day. When this court vacated the sentence in Case No. 84220, this necessarily vacated the fine also. Thus, on remand Ahmed argued that Mrs. Afnan Ahmed supplied the money for bail, but neither she nor Ahmed had given the trial attorney authorization to sign the form allowing the bond money to be applied toward the fines, or they had revoked any such authorization before the resentencing. The argument continued that because R.C. 2937.40(B) provides that money deposited for bail may not be applied to fines except upon express approval of the

person who deposited the money, the bond money should be returned. The trial court rejected this argument and reimposed the fines. This court overruled this assignment of error, because neither the bond nor the clerk's office form were in the record, and without those documents this court could not review the assignment.

{¶ 12} In the application to reopen, Ahmed included copies of the "Felony Bail Recognizance" and the clerk's office form signed by the trial attorney. Ahmed argues that his appellate counsel was ineffective for failing to provide an adequate record and for failing to argue the following assignment of error: "The Trial Court erred in ordering the Appellant's bond to be applied to his costs and fines without first conducting a hearing to determine who had paid the bond."

{¶ 13} However, Ahmed's argument fails to show prejudice. R.C. 2937.40(B) provides that if someone other than accused provides the money for bail, that money may not be applied toward the satisfaction of a fine, except upon the express approval of the person who deposited the money. Subsection (C) provides that if the accused uses his own money for bail, then, if the accused is not indigent, the court may apply the bond money toward the fine. Thus, the threshold issue is whose money was used, Ahmed's or his wife's. At the resentencing Ahmed submitted his wife's affidavit which stated, "That money came from my account." This is not necessarily identical to stating, "That was my money." More importantly, during the resentencing

the trial judge explicitly heard argument on whether the bail money could be used toward satisfying the fines. The trial judge rejected the evidence presented: "Forget Mrs. Ahmed, because I wouldn't believe anything she said. Nothing Mrs. Ahmed would say would I believe." (May 23, 2006 Transcript, Pg. 14.) Furthermore, the documents submitted with the application do not aid Ahmed's case. The clerk's office form identified the money as the property of the defendant, and the Felony Bail Recognizance form was signed by Assam Ahmed, not Afnan Ahmed. Therefore, because the trial judge did hear the matter and because of the lack of evidence establishing the bail money as the wife's property, the proposed assignment of error would not have been well taken. There is no prejudice.

{¶ 14} Accordingly, the application to reopen is denied.

ANN DYKE, JUDGE

CHRISTINE T. MCMONAGLE, P.J., AND
MELODY J. STEWART, J., CONCUR

ORC Ann. 2907.02 (2008)
§§ 2907.02. Rape

(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:

(a) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat or force, or deception.

(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

(c) The other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age.

(2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

(B) Whoever violates this section is guilty of rape, a felony of the first degree. If the offender under division (A)(1)(a) of this section substantially

impairs the other person's judgment or control by administering any controlled substance described in section 3719.41 of the Revised Code to the other person surreptitiously or by force, threat of force, or deception, the prison term imposed upon the offender shall be one of the prison terms prescribed for a felony of the first degree in section 2929.14 of the Revised Code that is not less than five years. Except as otherwise provided in this division, notwithstanding sections 2929.11 to 2929.14 of the Revised Code, an offender under division (A)(1)(b) of this section shall be sentenced to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code. If an offender is convicted of or pleads guilty to a violation of division (A)(1)(b) of this section, if the offender was less than sixteen years of age at the time the offender committed the violation of that division, and if the offender during or immediately after the commission of the offense did not cause serious physical harm to the victim, the victim was ten years of age or older at the time of the commission of the violation, and the offender has not previously been convicted of or pleaded guilty to a violation of this section or a substantially similar existing or former law of this state, another state, or the United States, the court shall not sentence the offender to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code, and instead the court shall sentence the offender as otherwise provided in this division. If an offender under division (A)(1)(b) of this section previously has been convicted of or

pleaded guilty to violating division (A)(1)(b) of this section or to violating an existing or former law of this state, another state, or the United States that is substantially similar to division (A)(1)(b) of this section, if the offender during or immediately after the commission of the offense caused serious physical harm to the victim, or if the victim under division (A)(1)(b) of this section is less than ten years of age, in lieu of sentencing the offender to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code, the court may impose upon the offender a term of life without parole. If the court imposes a term of life without parole pursuant to this division, division (F) of section 2971.03 of the Revised Code applies, and the offender automatically is classified a tier III sex offender/child-victim offender, as described in that division.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under Section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise is unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim.

(G) It is not a defense to a charge under division (A)(2) of this section that the offender and the victim were married or were cohabiting at the time of the commission of the offense.

ORC Ann. 2907.03 (2008)
§§ 2907.03. Sexual battery

(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

(1) The offender knowingly coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution.

(2) The offender knows that the other person's ability to appraise the nature of or control the other person's own conduct is substantially impaired.

(3) The offender knows that the other person submits because the other person is unaware that the act is being committed.

(4) The offender knows that the other person submits because the other person mistakenly identifies the offender as the other person's spouse.

(5) The offender is the other person's natural or adoptive parent, or a stepparent, or guardian, custodian, or person in loco parentis of the other person.

(6) The other person is in custody of law or a patient in a hospital or other institution, and the offender has supervisory or disciplinary authority over the other person.

(7) The offender is a teacher, administrator, coach, or other person in authority employed by or serving in a school for which the state board of

education prescribes minimum standards pursuant to division (D) of section 3301.07 of the Revised Code, the other person is enrolled in or attends that school, and the offender is not enrolled in and does not attend that school.

(8) The other person is a minor, the offender is a teacher, administrator, coach, or other person in authority employed by or serving in an institution of higher education, and the other person is enrolled in or attends that institution.

(9) The other person is a minor, and the offender is the other person's athletic or other type of coach, is the other person's instructor, is the leader of a scouting troop of which the other person is a member, or is a person with temporary or occasional disciplinary control over the other person.

(10) The offender is a mental health professional, the other person is a mental health client or patient of the offender, and the offender induces the other person to submit by falsely representing to the other person that the sexual conduct is necessary for mental health treatment purposes.

(11) The other person is confined in a detention facility, and the offender is an employee of that detention facility.

(12) The other person is a minor, the offender is a cleric, and the other person is a member of, or attends, the church or congregation served by the cleric.

(B) Whoever violates this section is guilty of sexual battery. Except as otherwise provided in this division, sexual battery is a felony of the third degree. If the other person is less than thirteen years of age, sexual battery is a felony of the second degree, and the court shall impose upon the offender a mandatory prison term equal to one of the prison terms prescribed in section 2929.14 of the Revised Code for a felony of the second degree.

(C) As used in this section:

(1) "Cleric" has the same meaning as in section 2317.02 of the Revised Code.

(2) "Detention facility" has the same meaning as in section 2921.01 of the Revised Code.

(3) "Institution of higher education" means a state institution of higher education defined in section 3345.011 [3345.01.1] of the Revised Code, a private nonprofit college or university located in this state that possesses a certificate of authorization issued by the Ohio board of regents pursuant to Chapter 1713. of the Revised Code, or a school certified under Chapter 3332. of the Revised Code.

ORC Ann. 2907.06 (2008)
§§ 2907.06. Sexual imposition

(A) No person shall have sexual contact with another, not the spouse of the offender, cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

(1) The offender knows that the sexual contact is offensive to the other person, or one of the other persons, or is reckless in that regard.

(2) The offender knows that the other person's, or one of the other person's, ability to appraise the nature of or control the offender's or touching person's conduct is substantially impaired.

(3) The offender knows that the other person, or one of the other persons, submits because of being unaware of the sexual contact.

(4) The other person, or one of the other persons, is thirteen years of age or older but less than sixteen years of age, whether or not the offender knows the age of such person, and the offender is at least eighteen years of age and four or more years older than such other person.

(5) The offender is a mental health professional, the other person or one of the other persons is a mental health client or patient of the offender, and the offender induces the other person who is the client or patient to submit by falsely representing to the other person who is the client or

patient that the sexual contact is necessary for mental health treatment purposes.

(B) No person shall be convicted of a violation of this section solely upon the victim's testimony unsupported by other evidence.

(C) Whoever violates this section is guilty of sexual imposition, a misdemeanor of the third degree. If the offender previously has been convicted of a violation of this section or of section 2907.02, 2907.03, 2907.04, 2907.05, or 2907.12* of the Revised Code, a violation of this section is a misdemeanor of the first degree.

ORC Ann. 2953.08 (2008)
§§ 2953.08. Grounds for appeal by defendant or prosecutor of sentence for felony; appeal cost oversight committee [Pertinent provision]

(A) In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds:

(1) The sentence consisted of or included the maximum prison term allowed for the offense by division (A) of section 2929.14 or section 2929.142 [2929.14.2] of the Revised Code, the sentence was not imposed pursuant to division (D)(3)(b) of section 2929.14 of the Revised Code, the maximum prison term was not required for the offense pursuant to Chapter 2925. or any other provision of the Revised Code, and the court imposed the sentence under one of the following circumstances:

(a) The sentence was imposed for only one offense.

(b) The sentence was imposed for two or more offenses arising out of a single incident, and the court imposed the maximum prison term for the offense of the highest degree.

(2) The sentence consisted of or included a prison term, the offense for which it was imposed is a felony of the fourth or fifth degree or is a felony drug offense that is a violation of a provision of Chapter 2925. of the Revised Code and that is

specified as being subject to division (B) of section 2929.13 of the Revised Code for purposes of sentencing, and the court did not specify at sentencing that it found one or more factors specified in divisions (B)(1)(a) to (i) of section 2929.13 of the Revised Code to apply relative to the defendant. If the court specifies that it found one or more of those factors to apply relative to the defendant, the defendant is not entitled under this division to appeal as a matter of right the sentence imposed upon the offender.

(3) The person was convicted of or pleaded guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense, was adjudicated a sexually violent predator in relation to that offense, and was sentenced pursuant to division (A)(3) of section 2971.03 of the Revised Code, if the minimum term of the indefinite term imposed pursuant to division (A)(3) of section 2971.03 of the Revised Code is the longest term available for the offense from among the range of terms listed in section 2929.14 of the Revised Code. As used in this division, "designated homicide, assault, or kidnapping offense" and "violent sex offense" have the same meanings as in section 2971.01 of the Revised Code. As used in this division, "adjudicated a sexually violent predator" has the same meaning as in section 2929.01 of the Revised Code, and a person is "adjudicated a sexually violent predator" in the same manner and the same circumstances as are described in that section.

(4) The sentence is contrary to law.

(5) The sentence consisted of an additional prison term of ten years imposed pursuant to division (D)(2)(a) of section 2929.14 of the Revised Code.

(6) The sentence consisted of an additional prison term of ten years imposed pursuant to division (D)(3)(b) of section 2929.14 of the Revised Code.

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(G)(1) If the sentencing court was required to make the findings required by division (B) or (D) of section 2929.13, division (D)(2)(e) or (E)(4) of section 2929.14, or division (H) of section 2929.20 of the Revised Code relative to the imposition or modification of the sentence, and if the sentencing court failed to state the required findings on the record, the court hearing an appeal under division (A), (B), or (C) of this section shall remand the case to the sentencing court and instruct the sentencing court to state, on the record, the required findings.

(2) The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing court abused its discretion. The appellate court may

take action authorized by this division if it clearly and convincingly finds either of the following:

(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (D)(2)(e) or (E)(4) of section 2929.14, or division (H) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

(b) That the sentence is otherwise contrary to law.

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